



April 22, 2005

Floor Speeches
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Noteworthy:

"We will have the votes"

-Senator Mitch McConnell, 700 Club, 4/22/05

"Neither party for 214 years used the filibuster to block a vote on the floor of the United States Senate -- of any judicial nomination -- and that has worked very well for our country."

- Senator Rick Santorum, Nightline, 4/21/05:

Floor Statement of Senator Bob Bennett
April 22, 2005

Mr. President, the senator from Colorado talked about the ongoing conversation with respect to the filibuster in the Senate. If I may, I would like to reminisce for a little while because I have something of a history in the Senate. I have clearly not been here nearly as long as many of my colleagues, but I first came into this chamber when I was a teenager. My father was a senator. I was a summer intern in his office. I suppose there was something strange about me as a teenager because I was more interested in the Senate than I was in sports or cars, the two subjects that young boys are supposed to be paying attention to.

I remember sitting in the family gallery one evening listening to the debates. In those days, there were debates. There was not the situation we find now where senators come to the floor to posture for the television cameras. They came to the floor to have a clash of ideas. I remember a particular debate where a senator on the Democratic side of the aisle was holding forth. He seemed to be winning the argument and the senators on the Republican side of the aisle sent up the call for the chairman of the Finance Committee, who entered the back of the chamber. I remember the Democratic senator saying, I see the Republicans have brought up their heavy artillery. Then there was an

exchange between these two senators which the chairman of the Finance Committee clearly won.

The Democratic senator got a little flustered and a little angry at being bested in the debate and so he started to complain about the fact that Colorado, a small state, had as many senators as Illinois, the big state, which he represented. Whereupon the chairman of the Finance Committee from Colorado then said, the senator is no longer opposed to the bill. He is now opposed to the Constitution. I must say, I am not surprised. And he turned on his heel and walked out and the debate was over. It was an exciting thing to watch for those of us who were political junkies.

We have come a long way from that. I don't think it is a long way forward. We have come a long way from the give and take of debate into an atmosphere where this Senate has become the platform for people to express harsh views, strong political rhetoric, and occasionally, in my view, go over the line of that which is appropriate. We have become a sounding board for partisanship rather than a deliberative body for debate.

I am not quite sure when we started in that direction or what brought us from that old time to this present time. One of the moments might have been the debate over the nomination of Robert Bork to the Supreme Court. Robert Bork is the only nominee I know of whose name has turned into a verb. We now hear groups, as they talk about a nominee, say "we're going to Bork him." Look back at what was done with respect to the nomination of Robert Bork and it was nothing short of character assassination; or, to use a phrase that was popular in the last administration, the politics of personal destruction.

We have seen that activity poison the comity of the Senate on both sides of the aisle because when it was done to Robert Bork on behalf of those who were opposed to the nomination made by President Reagan, those who were Reagan supporters began to say, we will do the same thing. When Democratic presidents came along, their nominees began to be attacked on a personal basis rather than on the merits of the situation, much as Robert Bork had been. Now it becomes a standard tactic on both sides of the aisle.

Why do I raise that with respect to the controversy over whether the Senate has the right by majority vote to change its rules? I raise it because too much of the current debate over that question has gone in the direction of "Borking" -- senators on both sides of the aisle, the process on both sides of the aisle and, if you will, the institution itself.

I have great reverence for this institution and I am distressed at what I see as I look over the landscape with respect to this particular debate. I see on one side e-mails and press releases saying we must stop George W. Bush from packing the courts with right-wing whackos. That is what this debate is about. The filibuster is our tool to prevent right-wing whackos from getting on the court.

The first circuit court judge ever prevented from gaining a vote by virtue of the filibuster in the history of the American republic was a man named Miguel Estrada. Miguel Estrada is an immigrant to this country. He came here not speaking English. He graduated from the Harvard Law School as the editor of the Harvard Law Review. He served in the Justice Department under the first

President Bush in the Solicitor's Office and received glowing recommendations and reports from every one of his superiors. Indeed, his performance was sufficiently outstanding that he remained in the Justice Department in the Solicitor's Office for two years while Janet Reno was the attorney general. Janet Reno is not known for harboring right-wing whackos.

The American Bar Association gave him their highest recommendation for this position and they are not known for harboring right-wing whackos.

Yet the level of debate has followed to the point that those who decided they must oppose Miguel Estrada for whatever reason stand mute while he and others like him are attacked as right-wing whackos. Unfortunately, this kind of attack does not stay on one side or the other. Today there are radio ads being run in the home states of senators who have still not made up their mind how they are going to vote, radio ads that attack these senators' integrity and suggest if they do not vote as the majority leader would like them to vote, they are not people of faith. They are attacking their integrity and their religion. To me, that is as repugnant as attacking the president's nominees as right-wing whackos.

This kind of vilification must stop, but I don't know how to stop it. The first amendment gives us all a right to say whatever we want to say, however ridiculous it may be, however offensive it may be. But it is ridiculous and it is offensive to have the kind of debate going on over this issue. This is a legitimate issue on which senators can have legitimately differing views. It should not become a vehicle for practicing the politics of personal destruction. But it is going on.

I simply raise my voice in the hope that on both sides, the temperature of the rhetoric can come down, and we can discuss the issue on its merits. Let me do my best to discuss the issue on its merits in the time I have.

First, what are we talking about? We are talking about changing a Senate tradition. We are also talking about changing a Senate rule. I want people to understand the two are not the same. Indeed, we have formal rules in the Senate governing the way we do business. We have created traditions and, quite frankly, the tradition trumps the rule. If somebody invokes the rule, they can overturn the tradition, but the tradition that has taken hold trumps the rule.

I will give an example of which I am sure the presiding officer is aware. The rule says the presiding officer is required to recognize whichever senator addresses the chair first. The tradition is that the presiding officer recognizes the majority leader first, even if he is not the first one in a jump-ball situation to shout out the name of the presiding officer. The tradition says the presiding officer recognizes the minority leader second, recognizes the majority manager of the bill third, the minority manager of the bill fourth, and then those senators who ask for recognition are recognized according to the rule.

We honor that tradition for a variety of good reasons. We have not written it into the rules, but it does not matter because the tradition trumps the rule and it helps the Senate move forward.

I make a point of this difference for this reason: those who say the filibuster being used to stop judicial nominees are acting in accordance with the rule, are exactly right. The rule has always been there and those who used the

rule to stop the nomination to prevent an up-or-down vote on Miguel Estrada were entirely within their rights and acting absolutely in compliance with the rules. Let's not demonize them for using the rules.

However, those who say it is a violation of the Senate tradition to use the filibuster to block a circuit court judge are also exactly right. By tradition, we have always held in the Senate that a nominee who gets out of committee and comes to the Senate is entitled to an up-or-down vote. By invoking the rule in the last Congress, the then-Democrat leader overturned the tradition. By talking about changing the rule now, the Republican leader, the majority leader, is entirely within his rights. Neither one should be demonized for the position they took.

Let's look at why the tradition held for so many years. It held because the spirit of comity ruled in the Senate and each party recognized the time would come when the other party would control the presidency. Indeed, if you look at history, it is almost inevitable that the other party will control the presidency. Since the end of World War II through the election of 2004, we have had 15 presidential elections. The party in power has won eight and the party out of power has won seven. You cannot get any closer than that. There has been only one time in that entire run where a single party won three consecutive elections, Reagan in 1980, Reagan in 1984, and Bush in 1998. Every other time the longest run either party has been able to have has been 8 years, so the historic norm says there will be a Democratic president after 2008. I hope that is not the case, but that is what history suggests will happen.

Each side has recognized that their side will have a president within a relatively short period of time -- since the end of World War II, within less than 8 years. So each side has said, let us not invoke the rule that says you can filibuster judges.

Instead, let us abide by the tradition that says every nominee is entitled to an up-or-down vote. That way, when we get the presidency, our president will have the same courtesy we are now extending to their president.

I remember very clearly when President Clinton sent some nominees to this body which members of my conference decided were left-wing whackos, if I might use that phrase. They, fortunately, did not use that phrase in public as it is being used now. And I do not think they should. But they felt these nominees were too extreme to be on the bench.

When it was clear we did not have the votes to prevent them from going on the bench, there were those in the conference who said: We have to filibuster. Let's use the filibuster to prevent them. We can muster 41 votes.

The chairman of the Senate Judiciary Committee, my colleague from Utah, Orrin Hatch, and the then-majority leader, the senator from Mississippi, Trent Lott, both pled with us: Don't do it. Don't start down that road. We have never done it before. And we shouldn't do it now.

And why not? Because, they said: After 2000, we are going to have the presidency, and we want our president to have the same courtesy we are begging with you to extend to President Clinton. They carried the day. There was no Republican filibuster on the floor of any circuit court judge.

Now we find ourselves in a situation where the tradition has been changed, and the question is, will we now change the rule to reestablish the tradition? It is a legitimate debate. I have respect for those who hold positions on both sides.

I do make this comment. If the rule change does not go through, and the rule that now holds that says judicial nominees are fair game, I guarantee the next time the Democratic Party has a president who sends up a nominee that 41 senators on the Republican side decide they do not like, the Republicans will abide by the rule that has changed the tradition, and they will filibuster the nominee.

Now, I have many of my colleagues who say: No, no, we would never do that. We honor the tradition, and we would go back to that tradition.

I do not believe them. I do not say they are lying to us. I think they believe what they are saying now. But I believe, in the heat of the battle that would come with a Republican minority in the Senate and a Democratic president, the Republicans, in the present atmosphere, would say: Let's use the filibuster. Let's give them a taste of their own medicine. The level of political dialogue would continue to go down. The level of personal destruction would continue to go up.

The other question I raise for speculation: Suppose nothing happens in this Congress, Democrats win the presidency in 2008, the Republicans do use the filibuster to stop judges a Democratic president sends forward, but the Democrats are in control of the Senate. Will those who are standing here saying this is a disaster for the Senate give a pledge that they will not, when they are in the majority, suggest using 51 votes to get rid of the filibuster on judicial nominees?

I suggest they would be tempted to do the same thing the Republicans are trying to do now in order to take care of their Democratic president. Indeed, the record shows they have done that.

These quotations have already been given on the floor, but I want to repeat them in this context.

Senator Byrd, in 1979, said:

Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past...[I]t is my belief -- which has been supported by rulings of vice presidents of both parties and by votes of the Senate -- in essence upholding the power and right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress.

Senator Byrd now disavows that position. And I respect that. Each one of us is entitled to change our mind. I have changed my mind. He is entitled to change his. Will he make a pledge he will not change it back when the Democrats are in the majority and say: "We want to prevent filibusters of our president's judicial nominees"?

Senator Kennedy said in 1975:

By what logic can the Senate of 1917 or 1949 or 1959 bind the Senate of 1975? As Senator Walsh of Montana said during the Senate debate in 1917 on the enactment of the original rule XXII: "A majority may adopt the rules

in the first place. It is preposterous to assert that they may deny future majorities the right to change them." Senator Kennedy has obviously changed his mind. And I respect the senator's right to change his mind. But I ask again, What assurance do we have he will not change his mind back if the Democrats get the majority and are seeking to protect a President of their own?

In 1995, there were nine senators who voted in favor of eliminating all filibusters, not just judicial filibusters, all filibusters -- nine senators still serving, Senator Bingaman, Senator Boxer, Senator Feingold, Senator Harkin, Senator Kennedy, Senator Kerry, Senator Lautenberg, Senator Lieberman, and Senator Sarbanes. They voted in favor of eliminating all filibusters. They have now changed their minds. They have the right to change their minds. And I respect that. What indication do we have they will not change their minds back if we do not get this thing settled in this Congress?

Going back to the newspaper that sometimes acts as the house organ for the Democratic party, the New York Times, this is what they had to say in 1995, when Senator Harkin introduced the legislation to eliminate filibusters.

Mr. president, I ask unanimous consent that editorials of the New York Times be printed in the record at the conclusion of my statement.

(See Exhibit 1.)

The New York Times said: "Time to Retire the Filibuster." That is the headline on the editorial. It says:

The U.S. Senate likes to call itself the world's greatest deliberative body. The greatest obstructive body is more like it.

And they go on to attack filibusters and give a little of the history. And then this is their summary of the filibuster, four paragraphs down:

One unpleasant and unforeseen consequence has been to make the filibuster easy to invoke and painless to pursue. Once a rarely used tactic reserved for issues on which senators held passionate convictions, the filibuster has become the tool of the sore loser, dooming any measure that cannot command the 60 required votes.

Well, you would think, then, that when the Republicans are saying, "Well, we don't want to eliminate the legislative filibuster, but we do want to re-enthroned the Senate tradition that the filibuster is not used on circuit court judges," the first cheerleader would be the New York Times. Having labeled the filibuster "the tool of the sore loser," and saying that it is obstructionist, the New York Times ought to be cheering the idea that finally a majority is about to follow their advice offered in their editorial pages.

But, no, this is what the New York Times now says: "The Senate on the Brink." This is an editorial of March 6, 2005:

The White House's insistence on choosing only far-right judicial nominees.

There is the politics of personal destruction I was referring to earlier -- "only far-right judicial nominees" has already damaged the federal courts. Now it threatens to do grave harm to the Senate. If Republicans fulfill their threat to overturn the historic role of the filibuster in order to ram the Bush administration's

nominees through, they will be inviting all-out warfare and perhaps an effective shutdown of Congress.

Interesting what 10 years' time and a change of administrations can do. The filibuster that was "the tool of sore losers" suddenly has become "the historic role," even though they cannot point to a single case in history where the filibuster has been used to prevent an up-or-down vote on a circuit court nominee who made it to the floor.

How they can call that a "historic role" is something I will leave to the editorial writers of the New York Times.

I hope we will not see any more press releases attacking the president's nominees as "right-wing whackos," that we will not see any more radio ads attacking senators who are examining this matter as being people of no faith, that we will stop the politics of personal destruction on both sides of this issue, and we will look at it in its historic pattern.

What we do or do not do on this issue will set the tone of where the Senate and future presidents go for decades to come. The Republic survived for over 200 years without the minority of either party exercising its right to filibuster judges. I think we should be very careful about enshrining in tradition the rule that says it is time to change.